127 I.A.2 141

54281

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES TOGHER, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE ALLEN F. ROSIN, PRESIDING.

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

CHICAGO BAR ASSOCIATION

Defendant was found guilty of driving a motor vehicle while under the influence of intoxicating liquor, in violation of Section 47 of the Uniform Act Regulating Traffic on Highways. Ill. Rev. Stat. 1967, ch. 95 1/2, § 144. The court imposed a fine of $100 and costs, which resulted in revocation of defendant's driver's license. Defendant contends that the State failed to prove him guilty beyond a reasonable doubt.

On October 26, 1968, the arresting officer arrived on the scene several minutes after a collision which occurred at about 10:30 P.M. between defendant's car and another. He testified that he detected an "apparent odor of alcoholic beverage" on defendant's breath; that it was "very faint"; that defendant's eyes were bloodshot and his face flushed; and that, although defendant was not subjected to any performance tests, the officer observed that defendant, while walking, swayed when turning. He testified further that defendant's clothing was in an orderly condition, his attitude was polite, there were no unusual actions, and his speech was "fair."[1] Defendant didn't stutter and he gave direct answers to all questions asked. The officer then stated that, in his opinion, defendant was under the influence of intoxicating liquor.

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1. He testified, when asked if defendant's speech was normal: "Well, I don't say normal because I never seen the man before--I say his speech was fair."

The State did not present any eye-witness testimony concerning the collision, nor was any explanation given for the absence of the driver of the other car. Further, there was nothing to indicate that the officer had refreshed his recollection from any report he may have written at the time of defendant's arrest.

Defendant testified that, on the date in question, he, accompanied by friends, was driving his automobile north on Ashland Avenue, a protected thoroughfare. He was going about 25 miles per hour when a station wagon pulled in front of him from Sunnyside Avenue without stopping at the stop sign. While he stopped quickly, a collision followed, with very little damage to either vehicle. Nobody was injured,so far as he knew. He testified that he told the officer at the scene his version of the accident. Further, he explained that he had left a friend's house ten minutes before and, while there, had consumed one scotch and water in a highball glass, as was his custom before dinner; that he had not had anything else to drink that day and his driving was not affected by it. He testified further that his eyes were always bloodshot, and were bloodshot at the time of the trial.

Edward Shepard, who was riding with defendant when the accident occurred, corroborated defendant's testimony in all essential respects, including the customary appearance of bloodshot eyes. He testified that defendant had consumed only one drink and was driving carefully, with complete control of the automobile, when the accident occurred. He yelled to defendant when he saw the car pull right in front of them without stopping. Defendant jammed on the brakes but couldn't quite stop in time to avoid the other car.

On rebuttal, the arresting officer was recalled as a witness and testified that he had measured skid marks of 85 feet left by defendant's automobile, and that this was the basis for his issuance of a ticket for driving too fast for conditions.

Judgment was entered finding defendant guilty, as recited above. Thereafter, defendant filed a petition for a new trial to which was attached a copy of the accident report[2] which had been filed by the arresting officer in regard to both tickets which had been issued to defendant. The motion was denied.

Defendant testified that he had consumed an alcoholic beverage shortly prior to the instant accident, but mere consumption of that amount does not establish intoxication. There must be sufficient proof of facts tending to show intoxication before defendant can be adjudged guilty. Kitten v. Stodden, 76 Ill. App. 2d 177. The proof here consisted of certain observations made by the arresting officer who testified that he detected a very faint odor of alcohol on defendant's breath and that defendant, while walking, swayed when turning. He testified that defendant's eyes were bloodshot, but defendant and his friend indicated that this was a natural condition. The officer also offered the favorable testimony that defendant was polite and well dressed and his speech was "fair." Defendant and his friend denied that defendant was intoxicated, and stated that defendant had complete control of his car while driving carefully at 25 miles per hour. The collision occurred only when the driver of the other car went through a stop sign. The damage to both cars was minimal, and there were apparently no injuries.

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2. This document disclosed that neither in the section of the report form which is indicated for use to explain the nature of the accident, nor in any other part of the report, was there any reference to skid marks having been laid down by defendant's automobile, even though this was the basis testified to for the issuance of a speeding ticket. The officer had apparently testified entirely from memory four months after the occurrence. The report does indicate, however, that the driver of the other car had failed to yield the right of way to defendant, an important fact to which the officer did not testify at the trial.

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In view of the strong denial of intoxication by defendant and the other defense witness, and the character of the officer's testimony which was only very weakly incriminating as to direct evidence of intoxication, it appears that the trial court must have placed very considerable reliance on the officer's testimony that he measured 85 feet of tire skid marks left by defendant's automobile, inferring a speed of perhaps 100 miles per hour before braking in an attempt to avert the collision. Indeed, the officer stated that the skid mark was the basis for his issuance of a speeding ticket. The driver of the other car--the only one in a position to offer direct evidence of such grossly excessive speed--was not called to testify for the State. Nor did the State introduce any evidence of this tremendous speed during its case in chief, but only as a sort of afterthought. Both of these features greatly weaken the State's case, in our opinion.

We recognize, as argued by the State, that the matter of credibility is essentially a question for determination by the trial court, but it is, nevertheless, our duty to reverse when the evidence is so unsatisfactory that it does not establish the alleged violation beyond a reasonable doubt. People v. Pellegrino, 30 Ill. 2d 331, 334; People v. De Stefano, 23 Ill. 2d 427, 431. It is our conclusion that the record, taken as a whole, leaves serious doubt as to defendant's guilt, and demonstrates that the State failed to meet its burden of proof.

Accordingly, the judgment of the Circuit Court is reversed.

R E V E R S E D.

DRUCKER and LEIGHTON, JJ., concur.

PUBLISH ABSTRACT ONLY.

127 I.A. 165 (1)

ABST.

CHICAGO BAR ASSOCIATION

52815

LOUIS V. LeCLAIRE, Plaintiff-Appellant, v. CHRIS-CRAFT BOAT SALES, INC., a corporation, Defendant-Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. J. Warren McCaffrey, Presiding Magistrate.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sues to recover damages of $7,016.36 from defendant on the ground that defendant induced plaintiff to buy a used boat from the defendant on the false oral representation that the boat was insurable against collision, public liability and property damage risks. In a nonjury trial judgment was entered for plaintiff in the sum of $592.86. Plaintiff appeals on the basis that the judgment is grossly inadequate.

On June 8, 1961, plaintiff talked to defendant's salesman, Francis Evans, and decided to purchase from defendant a used boat, the "Largo," built in 1925. Plaintiff made a deposit of $20 and signed a purchase order for the boat, on which Evans wrote that the boat was sold "as is and shown running at our dock." On June 16, 1961, and in the presence of Alfred Sorrell, a friend of plaintiff, plaintiff paid an additional $2500, the balance of the cash payment, and was given a receipt by Evans for the previous payment of $20 and the remaining $2500.

Plaintiff testified that before he handed Evans the $2500 check, he told Evans the boat had to be insurable. He mentioned full coverage, collision, public liability and property damage. Evans told him the boat was insurable and that it would be insured.

On June 30, 1961, a written contract was executed by both parties, and the boat was delivered to plaintiff. At that time

plaintiff told Evans that he wanted an insurance policy, and before he left with the boat Evans took him to the office of Jack Rodi of the defendant firm, who made a telephone call and then told plaintiff that he was insured and that he would get his policy within "60 to 90 days by mail," and that plaintiff's sales contract receipt would have to suffice until he got the policy in the mail.

On or about July 20, 1961, and while plaintiff was operating the boat on the Saginaw River in Michigan, the boat collided with something submerged, which made a hole in the bottom of the boat. The boat was repaired at the ship yard of Brennan Cruiser Sales at Bay City, Michigan. Floyd Thompson, an employee of Brennan, found evidence of extensive dry rot in the boat, and it was necessary to replace numerous parts of the hull in order to repair the damage. The repairs cost $533.20, which plaintiff paid. Brennan told plaintiff that the boat was not safe and was not insurable. Plaintiff kept the boat at Brennan's storage yard since 1961, paid storage charges on it and never used it for any purpose up to the trial in 1966. Plaintiff also made all payments on the contract.

Plaintiff's witness, a ship's carpenter with Navy training, who represented Allstate Insurance Company as a marine surveyor to pass on the insurability of boats, testified that he examined the "Largo" in May of 1962. He testified that the boat was beyond repair and had 40% dry rot. The bilge, the cabin walls, the frames, the keel and the planking had dry rot. He estimated the existence of the dry rot in the boat for at least ten years. He testified that Allstate would not insure the boat when he inspected it, nor would he have insured the boat on June 30, 1961.

Plaintiff's friend, Alfred Sorrell, testified that he was with plaintiff at the boat yard on June 16, 1961, and June 30, 1961, and corroborated plaintiff's testimony about the insurance.

He stated Rodi said, "Don't worry about it. It is completely insured. You will receive your policy in 60 to 90 days."

Defendant's witnesses included Evans, the salesman, who was no longer employed by defendant. On June 16, 1961, Evans showed the boat to plaintiff and his friend, Alfred Sorrell. Evans testified that his only conversation with plaintiff concerning insurance took place on June 30, 1961, after all the other terms of the agreement had been settled, and that the only representations to plaintiff on June 30 were that the boat was covered under a 10-day binder; what the premium charge would be if covered; and the coverage after the initial ten days was subject to a survey and inspection to be made within the ten days.

The testimony of Evans included that plaintiff wanted a figure on insurance, and "I told him I would take him to Jack Rodi, a sales engineer who handled insurance, and he will be glad to help him," and he heard Rodi telephone Lawson's office to get a figure. Plaintiff was present, and Rodi gave plaintiff a premium figure. Rodi said it would be subject to a survey. Plaintiff said at that time that he wanted to use the boat for the Fourth. Plaintiff was told that the boat would have to be made available for inspection before the policy was issued and that he was on a 10-day binder. Plaintiff took the boat from the boat yard that day.

On cross-examination Evans said that he made the sale and was in charge of the transaction and got the commission, and "I gave the office girl who typed the contract the insurance figure of $482, and that is the insurance information I received from Rodi. That is a year's insurance. The insurance figure was typed after everything had been straightened up on the deal." He wrote up the contract in longhand, and there was nothing in the contract about a binder.

A witness for defendant, Mrs. Georgia Kunde, a secretary employed by Chris-Craft, testified that on July 6, 1961, she

telephoned plaintiff in his home at Flint, Michigan, and told him that the 10-day binder would be expiring soon, and they had not received a survey on the boat. Plaintiff said that he paid for the insurance, and "I told him we had to have a survey in order to put the insurance in effect. He repeated he paid for insurance. He said he wanted Frank Evans to handle everything. He was the salesman. I told him Frank Evans was out of town at the time and would not be back before the binder expired. He said 'if it expires what would happen to the money I paid for insurance.' I said I didn't have any knowledge, evidently it would probably be returned to him, to go into the insurance agency. He didn't indicate whether he was going to send a survey or anything. When Frank returned back to the office, I informed Frank what I did." On cross-examination she said plaintiff was annoyed and said he paid for insurance and not to bother him.

Edward Lawson, a witness for defendant, testified he owned the Lawson Agency and insured many yachts. He knew that their office was requested to provide insurance for plaintiff and that a 10-day binder was in force, and "it was supposedly placed subject to survey." He knew the boat was in Michigan, and he then said, "We have got to get a survey on it. Let's get it done in Michigan." His office files showed that a claim was made to their company, and they advised the coverage had ceased. "After the 10 day binder we advised that to Rodi and we advised Chris Craft. We did not advise Mr. LeClaire."

George Leitner, a qualified independent marine surveyor, testified that in June 1965 he examined the boat in Michigan and found dry rot was present and the boat was in a general state of deterioration at the time, and it only had scrap value then. He could not determine whether the boat was insurable on June 30, 1961.

Summarized, plaintiff's contentions include: (1) that by entering the judgment for $592.86, which included the $482 insurance item and interest, the trial court in effect held that the

defendant, by accepting and retaining the $482 insurance money, thereby wrongfully represented that the boat was insurable. Plaintiff argues, "the conduct of the defendant of charging and retaining the full premium without refunding any part of it to the plaintiff, by itself, proved clearly the double fraud of the defendant; 1, in falsely representing that the boat was insurable; and 2, in falsely representing to the plaintiff that the boat was actually insured"; (2) that Rodi, defendant's key witness, did not testify and no showing was made at the trial as to why he did not testify. Plaintiff argues that this raises a strong inference that his testimony would have favored plaintiff; (3) that Evans was financially interested in the outcome of the suit because if it was held that defendant was liable to plaintiff, "Evans will undoubtedly have to return to the defendant the commission that he, Evans, collected on the sale of the boat"; (4) that although paragraph 5 of the written contract (plaintiff's Exhibit 4) stated that it included the entire agreement of the parties, that notwithstanding the parol evidence rule and the terms of the written contract between the parties, even if the insurance premium charge had not been inserted in the contract prepared by the defendant, plaintiff's oral proof was competent as to the defendant's false representations to the plaintiff that the boat was insurable, and that this false representation was made to the plaintiff to induce him to buy the boat; (5) that defendant's fraud in representing that the boat was insurable was proved by the testimony of plaintiff; (6) that even if the "as is" provision for the sale of the boat stated in the original order (plaintiff's Exhibit 1) had been inserted in the written contract (plaintiff's Exhibit 4), plaintiff would be entitled to recover from defendant "as the false representation of the defendant to the plaintiff that the boat was insurable induced the plaintiff to buy the boat and execute the written contract"; and (7) the trial court's judgment was against the manifest weight of the evidence.

Plaintiff's authorities include Antle & Bro. v. Sexton, 137 Ill. 410, 27 N.E. 691 (1891), where the court said (p. 414):

> "It is well settled that such an action will lie though the parties may have entered into a written agreement, and though in such agreement there be a warranty or stipulation upon the point covered by the misrepresentations. * * * And so it will lie if in the written contract there is no reference to the subject of the deceitful statements."

Also, Ginsburg v. Bartlett, 262 Ill. App. 14 (1931), where the court said (p. 35):

> "It is well settled by our decisions that parol evidence of fraudulent representations, not concerning a substantive part of the contract but made to induce a party to enter into the same, is admissible in evidence and has no tendency to vary the terms or provisions of the written contract. * * *
>
> " * * * The clause in the contract, stating that no representations have been made save as set forth in the writing, should be construed to have reference to the subject matter of the contract and not to representations fraudulently made to induce and bring about its execution. If the contention made be sound, then it would follow logically that a written contract containing the clause 'this contract was not procured by fraud,' would equally estop a defrauded party and render valid the contract, however gross the fraud may have been."

Defendant contends that the written order and sales contract, both having been executed by plaintiff, constitute the contract and the entire agreement between plaintiff and defendant. Defendant asserts that no representations were made in addition to those contained in the contract; that defendant afforded plaintiff "ample opportunity to personally inspect and to have others who accompanied him or upon his order inspect the boat purchased. There was no attempt to secrete the condition of the boat; it was expressly sold 'as is.'" Defendant asserts that the order of June 8, 1961, had written across its face a description of the boat as being a "used 47 ft. Elco as is and shown running at our dock." Also, the printed portion of the order immediately above plaintiff's signature stated in part that the standard warranty of defendant does not apply to any used boat, and that when the order was accepted by the manager it shall constitute the entire agreement between the parties.

Plaintiff's contentions are all grounded on the "double fraud of defendant": (1) in falsely representing to the plaintiff that the boat was insurable; and (2) in falsely representing to the plaintiff that the boat was actually insured. Plaintiff and Sorrell both testified as to the asserted "insurability" representations made by defendant's employees, Evans and Rodi, on June 16, 1961, and June 30, 1961. Defendant's witness Evans denied that he told plaintiff that the boat was insurable and that neither Rodi nor anyone connected with Chris-Craft told plaintiff that the boat was insured. Defendant's witness, Mrs. Georgia Kunde, testified that on July 6, 1961, she phoned plaintiff at his home in Flint, Michigan, and told him that the 10-day binder would be expiring soon, and that if he desired to continue insurance coverage he would have to make his boat available for inspection and survey. Plaintiff admitted the phone call and the substance thereof but maintained he did not know anything about a survey nor about a binder.

In view of the foregoing conflicting testimony, the issue of whether defendant induced plaintiff to buy a used boat from defendant on the false oral representation that the boat was insurable presented a question of fact for the decision of the trial court and depended largely on contradictory evidence. Apparently the trial court concluded that the evidence presented on behalf of defendant was more logical and credible and therefore found that no false representations were made by defendant of insurability or that the boat was insured.

This court is bound by the rule that where the trial court has seen and heard the witnesses, and the testimony is contradictory, the reviewing court will not substitute its judgment as to the credibility of the witnesses for that of the trial court and will not disturb the findings unless they are manifestly against the weight of the evidence. In order for a decision of the trial court to be contrary to the manifest

weight of the evidence, where the evidence is conflicting, an opposite conclusion must be clearly apparent. (Lipschultz v. So-Jess Management Corp., 89 Ill. App.2d 192, 203, 232 N.E.2d 485 (1967).) We conclude on the record before us an opposite conclusion to that of the trial court is not clearly evident, and therefore the judgment should be affirmed.

For the reasons given, the instant judgment is affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

CHICAGO BAR ASSOCIATION

52893)
52894) AFF.

PEOPLE OF THE STATE OF ILLINOIS, Appellee,

vs.

MARK CLANCY, Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. RICHARD FITZGERALD JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Mark Clancy, (impleaded) was charged in Indictment No. 66-931 filed on March 21, 1966, with the offense of conspiracy under Chapter 38, Section 8-2 of the Illinois Revised Statutes (1965); escape under Chapter 38 Section 21-6(a) of the Illinois Revised Statutes (1965); under indictment No. 66-932 filed on March 21, 1966, with the offenses of (3) counts of robbery while armed, under Chapter 38, Section 18-2 of the Illinois Revised Statutes (1963); aggravated kidnapping under Chapter 38, Section 10-2(1)(1) of the Illinois Revised Statutes (1963).

The defendant was arraigned on both indictments, he pleaded not guilty and the Public Defender was appointed to represent him.

On June 20th the Behavior Clinic was ordered to examine the defendant on motion of counsel on his behalf. The diagnosis was "Sociopathic Personality Disturbance. He knows the nature of the charge and is able to cooperate with his counsel."

On January 20, 1967, a jury was impaneled to adjudicate the ability of the defendant to competently stand trial. The jury found him competent to stand trial.

On January 24, 1967, the defendant withdrew his pleas of not guilty and he entered a general plea of guilty to both indictments. The trial court discussed the significance of the plea of guilty with the defendant before accepting it. It appears that the defendant's plea of guilty was voluntarily and understandingly made. Notice of an appeal was filed and a transcript of record was ordered and filed in this court on February 14, 1968, from a judgment of conviction for conspiracy, escape, robbery, and aggravated kidnapping. A sentence of five years to five years and one day was entered on the conspiracy charge to run concurrently with a certain sentence of imprisonment entered in the District Court for twenty-five years for the crime of armed robbery. A sentence of nine years to ten years was entered on the charge of escape which sentence was to run concurrently with the District Court's sentence. A sentence was entered on the charges of armed robbery and aggravated kidnapping for a term of twelve years to twelve years and a day to run concurrently with the District Court's sentence.

On February 26, 1970, the Public Defender filed a motion, after serving the defendant with a copy, for leave to withdraw on the ground that an appeal is without merit.

In support thereof, and pursuant to the ruling in the case of Anders v. California, 386 U. S. 738, he attached a brief in support of his motion to withdraw. It appeared to him that the only basis of appeal was a reference to the escape of the defendant which may have prejudiced the jury's decision as to his competency trial. He pointed out that there was no merit to this contention because both parties referred to the escape at that trial which vitiated any prejudice which may be imputed to the State.

The defendant was notified by this court on April 9, 1970, of the Public Defender's motion for leave to withdraw as his counsel and a copy of his motion and brief was attached. We informed him that he had until June 10, 1970, to file any points he might have in support of his appeal. We also informed him that after such date, we would make a full examination of all of the proceedings and decide whether the appeal is wholly frivolous, and if we so find, we may grant the Public Defender's request for withdrawal and affirm the judgment without further appointment of counsel.

We have made a complete examination of all of the proceedings in accordance with the requirements of Anders v. California (supra) and have concluded there is no merit to this appeal. The Public Defender's request for leave to withdraw as counsel for the defendant is therefore granted, and the judgment of convictions in both appeals is affirmed.

JUDGMENT AFFIRMED.

MURPHY AND ADESKO, JJ.

CONCUR.

(Abstract only)

ABST. 127 I.A.2 198

CHICAGO BAR ASSOCIATION

53182

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD PINKSTON and SYLVESTER LEWIS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. L. Sheldon Brown, J.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Edward Pinkston and Sylvester Lewis were convicted of burglary in a non-jury trial. Lewis was sentenced to a term in the penitentiary of two to four years; Pinkston to a term of one year to one year and one day. Their only contention is that their jury waiver should not have been accepted because it was not understandingly made.

When the defendants' case came to trial, the following colloquy took place:

Defense attorney: "Your Honor, we are ready for a bench trial.

The Court: All right. Swear the witnesses."

* * * *

Defense attorney: "Mr. Pinkston, Mr. Lewis, you gentlemen indicated to me you desire to be tried by the Judge, is that correct?

Pinkston: That's right.

Lewis: Yes.

Defense attorney: This form is a jury waiver. By signing it you waive your right to a trial by jury and the case will be tried before the Judge. Do you understand?

A defendant: What do you mean?

Defense attorney: In other words, if you sign this paper you will be tried by the Judge rather than a jury. Is that your desire?

Pinkston: Yes.

Lewis: Yes.

Defense attorney: Each of you sign it.

The Court: Sylvester Lewis.

Lewis: Here.

The Court: This is your handwriting and your signature on this paper here I show you?

Lewis: Yes, sir.

The Court: This is a jury waiver. You know what you are doing when you sign this paper? You are waiving your right to a trial by jury.

Lewis: Yes, sir.

The Court: This is what you want to do? You want to be tried by this Court?

Lewis: Yes, sir.

The Court: And, Pinkston, this is your signature and your handwriting here?

Pinkston: Yes, sir.

The Court: And you realize this is a jury waiver?

Pinkston: Yes, sir.

The Court: This is what you want to do? Waive your right to a trial by jury?

Pinkston: By you.

The Court: You want to be tried by this Court?

Pinkston: Yes, sir."

Chapter 38, para. 103-6, Ill.Rev.Stat., 1967, provides: "Every person accused of an offense shall have the right to a trial by jury unless understandingly waived by defendant in open court." Whether a waiver has been made understandingly depends upon the circumstances of each case. People v. Spencer, 115 Ill. App.2d 398, 253 N.E.2d 672 (1969).

The pre-trial colloquy shows that a jury trial was understandingly waived by each defendant. The defendants' counsel informed the court that the trial would be without a jury. The defendants did not object. This of itself constituted an understanding waiver. People v. Sailor, 43 Ill.2d 256, 253 N.E.2d 397 (1969). Their counsel then questioned both defendants as to their wish to waive a jury and explained to them the meaning and effect of signing a printed jury waiver. Each one answered that he desired to sign it. After the form was signed the trial judge carefully inquired whether the signatures were theirs, whether they understood the significance of their signing and whether they wanted to be tried by the court. The defendants answered all questions affirmatively.

Each defendant understandingly and expressly waived in open court his right to be tried by a jury and the waivers were properly accepted by the trial judge. The judgment is affirmed.

Affirmed.

Schwartz and McNamara, JJ., concur.

127 I.A.2 209

ABST.

CHICAGO BAR ASSOCIATION

54308

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
SHARON R. SMITH,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Mel R. Jiganti, AJ.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Sharon Smith was indicted for an convicted of the crime of murder for which she was sentenced to the penitentiary for fourteen to twenty-five years; she was also indicted for and convicted of the crime of aggravated battery for which she received a concurrent prison sentence of five to ten years. The sentences were imposed after she pleaded guilty to both indictments.

The defendant was informed of her right to appeal and the public defender was appointed to represent her. The appeal was filed but the public defender now seeks to withdraw as her counsel. In support of his motion he has filed a brief (pursuant to the ruling in Anders v. California, 386 U.S.738) which states that the only basis for an appeal would be whether the trial court fully admonished the defendant of the significance and consequence of her pleas of guilty. From his review of the common law record and the report of proceedings he has come to the conclusion that the admonishment complied with the requirements of the statute, the rule of the Supreme Court and the case law and that an appeal could not possibly be

successful. Ill.Rev.Stat., 1967, ch. 38, para. 115-2; Supreme Court Rule 401(b); People v. Ballheimer, 37 Ill.2d 24, 224 N.E.2d 811 (1967); People v. Kontopoulos, 26 Ill.2d 388, 186 N.E.2d 312 (1962).

Notice of the motion and copies of the motion and brief were sent to the defendant. A letter was also sent to her by this court advising her of the motion and brief and giving her two months to file any points she might wish in support of her appeal. Since five months have gone by and no response has been received from her, we have examined the record ourselves. From this examination we agree with the public defender that an appeal would be without merit.

The defendant was represented by private counsel who informed the court that he had consulted with her and that she wished to waive a jury trial and withdraw her pleas of not guilty. The court thereupon fully informed her of her right to a jury trial and carefully and adequately warned her of the consequences of her guilty pleas. Despite the court's explanations and admonishments as to each indictment she persisted in her pleas of guilty. There is no other point upon which an appeal could be based.

The motion of the public defender to withdraw as counsel for Sharon Smith is allowed and her conviction is affirmed.

Judgment affirmed.

Schwartz and McNamara, JJ., concur.

127 I.A.2 237

ABST.

54158

CHICAGO BAR ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIAM QUINLEY, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. James D. Crosson, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, William Quinley, was charged with armed robbery in seven separate indictments, in violation of Chapter 38, Section 18-2. On December 12, 1968, the defendant was arraigned and pleas of not guilty were entered. On March 28, 1969, these matters came on for trial at which time defendant's privately retained counsel informed the court that defendant wished to change his pleas of not guilty to guilty as to each offense charged. The trial judge addressed the defendant and asked whether his attorney had correctly stated his intention. The defendant replied, "Yes, sir," whereupon the judge asked whether he understood that entry of a guilty plea necessarily involved waiver of his right to trial by jury. Defendant answered affirmatively. The court then explained the nature of each charge lodged against the defendant and its possible punishment. After informing the court that he understood this also, defendant persisted in his pleas of guilty. Defendant's privately retained counsel and the Assistant State's Attorney then entered into a stipulation of facts involving each of the seven indictments. The court entered judgment on the pleas and a hearing in aggravation and mitigation was held. The defendant was then sentenced to serve from two to eight years on each of the seven indictments for armed robbery. The sentences were to run concurrently.

The Public Defender was appointed to represent the defendant on these appeals, which were filed on April 3, 1969, and the

Public Defender now requests leave to withdraw as defendant's attorney of record and has filed a brief in support thereof in accordance with the decision of Anders v. California, 386 U.S. 738 (1967), and the procedure established by this court by way of its implementation. Defendant was furnished with copies of the petition and brief and notified of his right to raise any points he wished considered in support of his appeal.

In the Public Defender's brief he sets forth only one point which he believes might conceivably support the appeal, that being whether the court fully admonished the defendant as to the significance and consequences of his change of plea from not guilty to guilty. The pertinent colloquy that took place between defendant, his private counsel and the court indicates that the trial judge scrupulously informed the defendant of the consequences of the change of plea. Defendant replied affirmatively to questions put by the judge, from which it was clearly determined that defendant's attorney had correctly stated his client's intention to plead guilty to each of the seven indictments and that defendant understood that entry of guilty pleas would result in an automatic waiver of a jury trial. The court advised defendant of the minimum and maximum sentences provided by law for the offenses charged and explained that the sentences could run either consecutively or concurrently. This procedure is in accord with the requirements of the statute (Ill. Rev. Stat. (1967), ch. 38, §115-2) and the Supreme Court Rules (Ill. Rev. Stat. (1967), ch. 110A, §401(b)).

On a full and complete examination of the record, the explanation and interrogation by the court were more than adequate to inform the defendant of the nature of the charges against him, the consequences of pleas of guilty and the penalties that might be imposed upon its acceptance. On the record before us, there is no question that the defendant knowingly, voluntarily

and intelligently elected to withdraw his pleas of not guilty and enter a plea of guilty as to all charges. People v. Williams, 44 Ill. 2d 334, 255 N.E. 2d 385 (1970); People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312 (1962); People v. Reynolds, (53749, Illinois Appellate Court, April 16, 1970); and People v. Rodriguez, (53103, Illinois Appellate Court, June 10, 1970).

In response to this court's notice to defendant, above set out, he has filed a pro se brief in support of his appeal in which he gives as grounds for reversal: (1) denies knowing any of the complainants named in the indictment; (2) alleges that he pleaded guilty to only six, not seven, indictments; (3) denies he understandingly and intelligently changed his pleas of not guilty or waived his right to trial by jury or that he was advised as to the consequences of his pleas of guilty; (4) denies having entered into a stipulation as to the evidence, either through himself or by counsel; (5) alleges judicial prejudice manifested by acceptance of the guilty pleas; and (6) attacks the identification procedures employed, all of which are dehors the record. These alleged irregularities, none of which are supported by the record, are said to support the appeal. They are the type of issues which were waived by a proper plea of guilty and we will not consider these issues since it is well settled that a voluntary plea of guilty waives all errors not jurisdictional. People v. Dennis, 34 Ill. 2d 219, 215 N.E. 2d 218 (1966); People v. Smith, 23 Ill. 2d 512, 179 N.E. 2d 20 (1961); and People v. Gray, 102 Ill. App. 2d 129, 243 N.E. 2d 545 (1968).

In addition to studying the brief filed by the Public Defender and a close examination of the points filed in the defendant's pro se brief, we have made a full examination of all the proceedings in accordance with the dictates of Anders v. California, 386 U.S. 738 and we find that the appeal is "wholly frivolous."

The Public Defender is therefore given leave to withdraw and the judgments of conviction are affirmed.

JUDGMENTS AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

127 I.A. 321
ABST.

53876

HARRIETTE SOLUB, Plaintiff-Appellee, vs. HYMAN SOLUB, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Robert L. Massey, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, Hyman Solub, has appealed from an order of the Circuit Court of Cook County requiring him to discharge a lien for real estate taxes for the year 1967, and to make certain repairs on property previously transferred to plaintiff as part of an agreed property settlement.

The original action, for divorce, resulted in a decree of divorce in favor of Harriette Solub. The decree, entered January 8, 1968, incorporated a property settlement agreement which states, in pertinent part:

> That defendant, HYMAN SOLUB, agrees to assume, pay and discharge the outstanding indebtedness with the U.S. Internal Revenue Service and all other outstanding debts arising out of the operation of his business; and that Defendant further agrees to pay and discharge in full any and all tax judgments and liens against the real estate commonly known as 966 West Cullerton Avenue, Chicago, Illinois, that now exist or in the future may arise as a result of the aforementioned indebtednesses (sic) within one year after the entry of the Decree for Divorce; that Defendant, HYMAN SOLUB, further agrees to hold Plaintiff, HARRIETTE SOLUB, harmless of said obligations personally and should said Defendant fail to pay the same within the stipulated time, as hereinbefore set forth, the Plaintiff shall have the right to enforce the provisions of this paragraph by contempt proceedings in this court.

Subsequent to the entry of the decree, a dispute arose between the parties concerning the issue of whether the above quoted provision of the decree required the defendant to pay real estate taxes on the property in question for the year 1967, and to make certain repairs necessary to correct violations of the Building Code of the City of Chicago. From a determination of

this issue in favor of plaintiff, defendant has appealed.

On appeal the defendant contends that the trial court erred in refusing to admit parol evidence concerning the intention of the parties to the agreed property settlement as incorporated in the decree.

The defendant has complied with all statutory requirements and rules of court in perfecting his appeal. Plaintiff, however, has failed to file a brief in response to the appeal, although this court has, on seven separate occasions, granted her requests for additional time to do so. When an appeal is perfected and the appellee does not file an answering brief, the reviewing court may reverse the judgment without further explanation of the merits of the appeal. Victor Manufacturing and Gasket Company v. City of Chicago, 110 Ill. App. 2d 342, 249 N.E. 2d 323 (1969); People ex rel. Food Empire, Incorporated v. City of Chicago, 102 Ill. App. 2d 87, 243 N.E. 2d 622 (1968). Pursuant to this authority, we reverse the judgment in the instant case without consideration of the cause on its merits.

JUDGMENT REVERSED

MC CORMICK, P.J., and BURKE, J., concur.

127 I.A.2 336

ABST.

54591

CHICAGO BAR ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. DARNELL NEWTON, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. JAMES D. CROSSON, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the crime of rape and was sentenced to a term of seven years to twenty-one years in the penitentiary. On this appeal briefs have been filed by the Public Defender of Cook County on behalf of the defendant, and by the defendant, pro se, to which the People have filed no answer.

In the early morning of December 10, 1967, the complaining witness, Grace Woods, was walking to her home on the near north side of Chicago when she noticed two men approaching from the rear on the opposite side of the street. When the men came abreast of her, one of them, later identified as the defendant, crossed the street directly towards Mrs. Woods, while the second man crossed on an angle in front of her. Mrs. Woods stopped walking and the defendant put his hand on her elbow. The second man approached the pair, holding both hands in his jacket pockets and gesturing as if he were holding a weapon. The defendant demanded money from Mrs. Woods, who replied that she had none. Defendant then stated that she would have to accompany him and the second man, at which point the second man threatened to "cut" the witness.

Pursuant to a hand signal, an automobile approached; Mrs. Woods was forced into the vehicle and forced to ride with her head on defendant's lap. The vehicle was later stopped beneath elevated

train tracks near the rear entrance to a building. The three men and Mrs. Woods alighted from the vehicle, entered the building and proceeded to the third or fourth floor where they met a fourth man. The four men, including the defendant, then forcibly had sexual intercourse with Mrs. Woods. After taking jewelry from the person of Mrs. Woods, the four men left the building. Mrs. Woods thereafter found her way out of the building and made her way on foot to a nearby hospital, where she reported the incident to the police and underwent a physical examination.

On January 4, 1968 Mrs. Woods identified defendant's photograph from a number of police photographs, and on January 16th she identified the defendant in person.

The defendant testified in his own behalf and stated that at the time the crime was allegedly being committed he was at his financee's house sick in bed.

The first point raised is that the jury was improperly informed that the defendant had been charged with a crime, separate from and unrelated to the one which he was charged with below. The record reveals that on Mrs. Woods' direct examination she was questioned concerning her pre-trial identification of the defendant. After testifying that she identified the defendant's photograph, she was then questioned as to where she was when she later saw the defendant in person. She replied, "I was standing on the sidelines while he was being arraigned for some other ——" to which an objection was made. After a conference, the trial judge specifically and emphatically instructed the jury to disregard Mrs. Woods' statement in that regard. The witness' answer was unresponsive to the question propounded by the prosecuting attorney. Secondly, the jury was specifically and emphatically instructed to disregard

the answer. We are of the opinion that the defendant was in no way prejudiced in this regard. See People v. O'Neal, 118 Ill. App. 2d 116, 125.

The cases cited by the defendant are not in point. In People v. Fort, 14 Ill. 2d 491, the jury was told that the defendant had been a rapist before and will always be a rapist. In People v. Harges, 87 Ill. App. 2d 376, the defendant was specifically asked on cross-examination if he had ever seen a certain police station before.

It is next argued that the trial court improperly allowed, over objection, a police officer to testify that Mrs. Woods had identified a photograph of the defendant, since the testimony was cumulative of Mrs. Woods' earlier testimony to that same effect and since Mrs. Woods was the only identification witness for the People. (See People v. Lukoszus, 242 Ill. 101.) A reading of the record reveals that the trial court refused to permit the officer to state whose photograph it was that Mrs. Woods had identified, but merely that she did identify a photograph. Further, the record does not reveal that the officer testified that Mrs. Woods saw the defendant at the police station; rather, the officer testified that he saw the defendant at the station. See People v. Campbell, 113 Ill. App. 2d 242; People v. James, 109 Ill. App. 2d 328.

In the "Supplemental Brief and Argument" filed in this Court by the defendant, pro se, it is first argued that the trial court improperly denied his motion for discharge under the Four-term Act. (Ill. Rev. Stat. 1967, Chap. 38, Para. 103-5.) He argues that although his counsel did agree to several continuances prior to the trial, counsel did so without prior consultation with the

defendant, who was in the penitentiary at the time on another conviction, thereby improperly waiving defendant's constitutional right to a speedy trial.

Originally the Public Defender of Cook County had represented defendant in these proceedings. Defendant objected to the counsel so appointed and demanded an attorney from the bar association. The trial court acceded to the defendant's wishes, the Public Defender was allowed to withdraw as counsel, and a "bar association lawyer" was appointed to represent the defendant.

The "bar association lawyer" thereafter agreed to several continuances which had the effect of tolling the running of the Four-term Act, so that defendant was eventually tried within the time prescribed by the statute. Defendant, however, states that his counsel had no right to agree to the continuances without his consent since this in effect was a waiver of defendant's constitutional right to a speedy trial, which waiver could be made only by defendant himself.

It has long been settled that the Four-term Act is intended to implement the provision in the constitution guaranteeing an accused the right to a speedy trial. The constitution does not fix a specific time within which an accused must be brought to trial. See generally, People v. Morris, 3 Ill. 2d 437. The actions of defendant's counsel, in agreeing to the continuances which tolled the running of the statute, were within the authority of this attorney in his representation of defendant and did not violate defendant's constitutional right to a speedy trial.

Defendant also contends that he was denied effective assistance of counsel inasmuch as he was permitted by the trial court to defend himself at trial. We disagree.

As noted above, the Public Defender was initially appointed as defense counsel in this matter. Defendant demanded, and received, a "bar association lawyer." Immediately prior to trial, and after his motion for discharge under the Four-term Act was denied, defendant demanded that the bar association lawyer withdraw from the matter (apparently because the motion for discharge had been denied) and defendant advised the court that he wished to defend himself. The court allowed counsel to withdraw and there upon designated an assistant public defender to advise the defendant in the conduct of his case. The record reveals that both the defendant and the assistant public defender did an effective job in the conduct of the trial. It is also clear that defendant was fully aware of the import of his request that his counsel withdraw from the matter so that he could defend himself. No error was committed in permitting the defendant to act pro se in his defense.

It is finally urged that the prosecuting attorney, in final argument, made comments prejudicial to the defendant, thereby depriving him of a fair trial. The matters referred to by the defendant were objected to and the jury was immediately instructed to disregard the comments. Further, defendant states that the prosecuting attorney injected his personal feelings as to defendant's guilt into the case. A reading of the record reveals that the prosecuting attorney was simply telling the jury that they should use their common sense in arriving at their verdict, and that they should find the defendant guilty as charged. We find no error in this conduct.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and LYONS, J., concur.